Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAUM,

Petitioners,

v.

LT. COL. JOHN SIMONINI, ALBERT D. SNYDER,
MARK P. YOURCHOCK and ROBERT M. RILEY,
individually and in their representative capacities
as employees for the various federal agencies
that employ them,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD GRANT THE TENENBAUMS' PETITION FOR WRIT OF CERTIORARI ON THE GROUNDS THAT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ESTABLISHED A "NEW RULE OF LAW" CONTRADICTING *UNITED STATES v. REYNOLDS*, 345 U.S. 1 (1953), IN HOLDING THAT THE STATE SECRETS PRIVILEGE MAY BE INVOKED EVEN WHERE, AS HERE, IT IS UNDISPUTED THAT THE CORE ISSUE OF THIS CASE IS INVIDIOUS DISCRIMINATION AND OTHER RESULTING UNLAWFUL CONDUCT COMMITTED BY EXECUTIVE AGENCIES AND/OR OFFICERS?

II. WHETHER THIS COURT SHOULD GRANT THE TENENBAUMS' PETITION FOR WRIT OF CERTIORARI ON THE GROUNDS THAT THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS CREATED A SPLIT WITH THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT AS TO WHETHER THE STATE SECRETS PRIVILEGE MAY BE INVOKED EVEN WHERE, AS HERE, IT IS UNDISPUTED THAT THE CORE ISSUE OF A CASE IS INVIDIOUS DISCRIMINATION AND OTHER RESULTING UNLAWFUL CONDUCT COMMITTED BY EXECUTIVE AGENCIES AND/OR OFFICERS?

III. WHETHER THIS COURT SHOULD GRANT THE TENENBAUMS' PETITION FOR WRIT OF CERTIORARI ON THE GROUNDS THAT THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS TRANSFORMED THE STATE SECRETS PRIVILEGE INTO AN UNLIMITED, UNCHECKABLE AND ABSOLUTIST EXECUTIVE BRANCH POWER IN VIOLATION OF THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS, LEGISLATIVE STATUTES AND EXECUTIVE REGULATIONS AND ORDERS?

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The Order of the United States District Court for the Eastern District of Michigan was issued on September 30, 2002 (App. A) and was affirmed by the United States Court of Appeals for the Sixth Circuit in an unpublished Opinion on May 19, 2004 (App. B). Respondents filed a Motion to Publish Opinion on May 24, 2004 on the basis that a "new rule of law" was established for the Sixth Circuit (App. C), and an Order granting the Motion was issued on June 4, 2004 (App. D). The May 19, 2004 Opinion of the United States Court of Appeals for the Sixth Circuit was subsequently published at 96 Fed. Appx. 998.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE IN THIS CASE

The invocation of the state secrets privilege in this case has placed the following at issue: the doctrines of separation of powers and judicial review; 5 U.S.C. § 7201(b) (App. E); 42 U.S.C. § 2000e-16 (App. F); 42 U.S.C. § 2000e-2(m) (App. G); 5 C.F.R. § 2635.101(13) (App. H); 5 C.F.R. § 3601.101 (App. I); 32 C.F.R. § 40.2 (App. J); DoD 5200.2-R, §§ 2-401(b)-(c) (App. K); Army Regulation ("AR") 60-21, § 1-17 (App. L); AR 380-67, §§ 2-401(b)-(c) (App. M); AR 381-20, § 4-5(d) (App. N); Executive Order 12333, §§ 2.1, 2.2, 2.4, 2.8 (App. O); Executive Order 12958, § 1.8(a) (App. P).

STATEMENT OF THE CASE

Statement of Material Facts and Proceedings

Petitioner, David Aaron Tenenbaum ("Tenenbaum"), has been employed as a civilian engineer by the United States Army since 1984. R. 17, Second Am. Compl. para. 14, Joint Appendix filed by the parties in the Sixth Circuit ("JA")[1] at 75. As an Army engineer, Tenenbaum was delegated broad research and development responsibilities and assignments on both a national and international scale. R. 96, Br. in Opp'n, Exhs. 2-14, JA at 627-716. Although Tenenbaum's international assignments involved a multitude of countries, Tenenbaum was frequently assigned to Army projects involving Israel based upon Tenenbaum's Jewish background. *Id.* at Exhs. 15-25, 111, JA at 717-790, 1419-1423.

Throughout Tenenbaum's career from 1984 through 1996, Tenenbaum always successfully carried out his national and international responsibilities and assignments while receiving above average if not superior evaluations from his supervisors. *Id.* at Exhs. 3-13, 41-43, 53-54, JA at 631-715, 910-954, 1025-1032. Despite these achievements, however, and unbeknownst to Tenenbaum, members of the Army and Department of Defense ("DoD"), began a clandestine operation in at least the summer of 1992 to have Tenenbaum investigated and incriminated for espionage on behalf of Israel solely because Tenenbaum is Jewish. *Id.* at Exhs. 18, 20, 26-30, JA at 725-727, 761-763, 791-852.

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1. The exhibits relied upon by Tenenbaum which are not attached in the Addendum hereto are referenced by page number to the Joint Appendix that was submitted to the Sixth Circuit in connection with the underlying proceedings.

As part of this clandestine operation from at least the summer of 1992 through the fall of 1996, members of the Army and DoD, including Defendants, John Simonini ("Simonini") and Mark Yourchock ("Yourchock"), raised allegations against Tenenbaum based solely upon Tenenbaum being Jewish. *Id.* at Exhs. 1, 18-20, 27, 29, 31-40, 43-57, 112, JA at 614, 620-621, 624, 733, 736-737, 753, 757, 759, 762, 764, 798-802, 810, 830, 832, 865-1050. Such allegations were directed to the FBI inasmuch as it is undisputed as a matter of law and fact that the FBI is the executive agency that maintains exclusive investigative jurisdiction over federal civilian employees in counter-intelligence matters. *Id.* at Exhs. 27, 29, 106, JA at 794,796, 838-839, 1400-1403; DoD 5200.2-R, §§ 2-401(b)-(c) (App. K) AR 380-67, §§ 2-401(b)-(c) (App. M); AR 381-20, § 4-5(d) (App. N); Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI, §§ 5-6 (Final Br. of Appellants, Vol. II, A46-A50); Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between FBI & DoD (Final Br. of Appellants, Vol. II, at A51-A54).

Inasmuch as the FBI maintained that there was no evidence that Tenenbaum had done anything wrong from 1992 through the fall of 1996, Defendants participated in an unlawful scheme to undermine the FBI's exclusive jurisdiction by submitting Tenenbaum for a security clearance upgrade from "secret" to "top secret" even though: (1) Tenenbaum did not need a security clearance at that time for any of his projects; and (2) unbeknownst to Tenenbaum, Defendants were surreptitiously accusing Tenenbaum of espionage. R. 96, Br. in Opp'n, Exhs. 1, 18, 20, 27, 29, 30, 33, 35, 39, 55-56, 58-84,

106, 113, JA at 616, 618-619, 723, 734-735, 737-739, 741, 745, 763, 806-807, 812, 834, 836-837, 846, 852-864, 875-876, 880, 891, 893-895, 897, 901-902, 1006, 1008, 1033-1049, 1051-1262, 1394-1399, 1403-1404, 1426-1444. The purpose of this scheme was to conduct a clandestine and unlawful criminal counterintelligence investigation into Tenenbaum under the guise of a routine security clearance upgrade investigation led by Defendants, Yourchock and Robert Riley ("Riley"). *Id.*

In furtherance of this scheme, Simonini and others in the Army and DoD continued to raise unsubstantiated allegations against Tenenbaum to Yourchock, Riley and even the FBI based solely upon Tenenbaum being Jewish. *Id.* Despite such allegations, however, the FBI continued to confirm from the fall of 1996 through January 23, 1997, that no evidence existed to support even a "possibility" that Tenenbaum had been involved in espionage-related activities. *Id.* at Exh. 85, JA at 1265.

Despite the FBI's findings, Yourchock and Riley conducted a six-hour interview of Tenenbaum on February 3, 1997 wherein they coerced Tenenbaum into submitting to a polygraph examination under threat of adverse employment actions and potential imprisonment. *Id.* at Exhs. 28-29, 73, 74-77, 86-89, JA at 817, 840-843, 1153, 1169-1174, 1178, 1268-1306. The polygraph examination of Tenenbaum was conducted by Defendant, Albert Snyder ("Snyder"), on February 13, 1997 in a small room with no windows, no two-way mirrors, no recording devices and no witnesses. *Id.* at Exhs. 20, 28-29, 73, 77-78, 88, 90, JA at 765, 818-819, 823-824, 844-845, 1163, 1175-1181, 1206, 1277-1281, 1317-1318.

The polygraph examination process, which lasted nearly six hours, consisted of Snyder asking Tenenbaum about his Jewish background, unhooking and rehooking Tenenbaum to the polygraph machine and shouting at Tenenbaum to confess while making belligerent and anti-Semitic remarks to the effect of 'I have done other Jews before' and 'I know you are lying so confess.' *Id.* at Exhs. 28, 73, 77, 88, 91-92, JA at 818-821, 1160-1161, 1165-1166, 1175-1183, 1283-1287, 1289, 1291. Although Tenenbaum made no confession inasmuch as he had done nothing wrong, Snyder informed the FBI, Army and DoD after releasing Tenenbaum that Tenenbaum had confessed to passing classified information to every Israeli Tenenbaum had ever worked with based upon the fact that Tenenbaum is Jewish. *Id.*

As a result of Snyder's fabrication, the FBI launched a criminal investigation into Tenenbaum which began with a raid of the Tenenbaums' house while their family was celebrating the Jewish Sabbath. *Id.* at Exhs. 20, 28, 77, 88, 93, JA at 769, 825, 1184, 1291, 1293, 1295, 1335-1341. The FBI's investigation lasted over 17 months during which time Tenenbaum was vilified as a spy and traitor throughout the national and international media while the Tenenbaums were tormented by the investigation itself. *Id.* at Exhs. 88, 94, JA at 1295, 1297-1299, 1301, 1342-1345.

The result of the FBI's investigation was a conclusive finding by the Department of Justice, including the FBI and the U.S. Attorney's Office, that no evidence existed against Tenenbaum and that Tenenbaum's "uncorroborated confession [to Snyder] served as the only lead in this matter." *Id.* at Exhs. 95-97, JA at 1346, 1377, 1383-1384. Even before the official closing of the investigation, the lead Assistant U.S. Attorney working with the FBI during the investigation

sent notification to the FBI on behalf of the United States Attorney for the Eastern District of Michigan that: "There is no question that if evidence existed which would prove this case, then these agents would have found it." *Id.* at Exh. 95, JA at 1346.

In addition, numerous of Tenenbaum's supervisors working for the Army — including the individual who actually suggested the plan to pretextually investigate Tenenbaum under the guise of a routine security clearance upgrade investigation — have submitted letters of support on Tenenbaum's behalf affirming that Tenenbaum has done nothing wrong. *Id.* at Exhs. 100-105, Apx. 1385-1392. In fact, the Commander of the Research and Development Center where Tenenbaum was employed testified under oath that none of the above events would have occurred had Tenenbaum not been Jewish. *Id.* at Exh. 68, JA at 1139, 1141.

As a result of Defendants targeting Tenenbaum because he is Jewish, the Tenenbaums, after properly serving notice of their intent to sue Defendants, filed the instant action in the United States District Court for the Eastern District of Michigan, Southern Division (the "District Court"). R. 1, Compl., JA at 14-42. The Tenenbaums alleged claims in this case pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and the Federal Tort Claims Act for: (1) Defendants' conspiracy to violate the Tenenbaums' Fourth Amendment rights by subjecting them to an unreasonable search and seizure without probable cause (Count I); (2) Defendants' individual acts in violation of the Tenenbaums' Fourth Amendment rights by subjecting them to an unreasonable search and seizure without probable cause (Count II); (3) Defendants' common law conspiracy in unlawfully investigating

Tenenbaum and manufacturing and attributing false confessions to Tenenbaum in an effort to justify an FBI criminal investigation (Count IV); (4) Defendants' defamatory statements against Tenenbaum (Count VIII); (5) Defendants' gross negligence in unlawfully investigating Tenenbaum and manufacturing and attributing false confessions to Tenenbaum in an effort to justify an FBI criminal investigation (Count X); and (6) the Tenenbaums' loss of consortium resulting from Defendants' actions (Count XI). R. 17, Second Am. Compl., JA at 73-100; R. 96, Br. in Opp'n, JA at 321-370.

On December 10, 2001, Defendants filed their Motion for Summary Judgment (the "Motion") on the basis that they should be entitled to invoke the state secrets privilege even if such invocation would have the effect of protecting their invidious discrimination and other resulting unlawful conduct. R. 93, Motion for Summary Judgment, JA at 279-319.

The Tenenbaums responded to Defendants' Motion by pointing out that the state secrets privilege is inapplicable in this case because: (1) the core issue of this case is invidious discrimination and other resulting unlawful conduct by executive officers which is not a state secret pursuant to Supreme Court precedent under *United States v. Reynolds*, 345 U.S. 1 (1953); and (2) no state secrets could possibly exist against Tenenbaum by virtue of the conclusive and authoritative admissions of the Department of Justice and the FBI that no evidence existed against Tenenbaum other than an issue of credibility between Tenenbaum and Snyder as to what transpired during Snyder's polygraph examination of Tenenbaum. R. 96, Br. in Opp'n, JA at 321-370.

The District Court did not conduct oral argument, and, on September 30, 2002, issued an Order granting Defendants' Motion on the sole basis that the state secrets privilege somehow prevented Defendants from presenting a defense to the Tenenbaums' claims. R. 111, Order, JA at 101-111 (App. A). The District Court specifically held that:

> the parties and the court agree that 'the core issue of this case involves Defendants' invidious discrimination against Tenenbaum which culminated in Snyder's interview of Tenenbaum from which Snyder attributed false confessions to Tenenbaum to finally justify an FBI criminal investigation which began with a search and seizure at Plaintiff's residence on the Sabbath, despite the fact that there was no probable cause for this search.' *Id.* at 8, JA at 108.

Despite finding that the core issue of this case involves Defendants' invidious discrimination which culminated in Snyder's attribution of false confessions to Tenenbaum and led to the FBI's criminal investigation, the District Court granted summary judgment in favor of Defendants concluding that:

> the allegation of religious discrimination is woven throughout Plaintiff's entire Second Amended Complaint. Thus, if the court were to allow any claim to proceed, the court finds that Defendants could not adequately defend against Plaintiff's assertions. *Id.* at 9, Apx. 109.

Inasmuch as the state secrets privilege appeared for the first time to be applied offensively to prevent litigation in which the core issue solely involved invidious discrimination

and resulting unlawful conduct as opposed to proper state secrets, the Tenenbaums appealed to the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") on October 30, 2002. R. 112, Notice of Appeal, JA at 112. On May 19, 2004, the Sixth Circuit issued an unpublished Opinion (App. B) affirming the District Court's decision without addressing the actual arguments set forth by the Tenenbaums. Instead, the Sixth Circuit stated that Defendants somehow cannot defend their invidious discrimination and other resulting unlawful conduct without revealing supposed state secrets. *See*, App. B.

On May 24, 2004, the U.S. Attorneys' Office filed a Motion to Publish Opinion (App. C) on the basis that the Sixth Circuit's affirmation of the District Court's decision "establishes a new rule of law" in the Sixth Circuit. On June 4, 2004, the Sixth Circuit issued an Order granting the Motion to Publish Opinion (App. D), and the Opinion of the Sixth Circuit was subsequently published at 96 Fed. Appx. 998.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Has "Establishe[d] A New Rule Of Law" Contradicting *United States v. Reynolds*, 345 U.S. 1 (1953), In Holding That The State Secrets Privilege May Be Invoked Even Where, As Here, It Is Undisputed That The Core Issue Of This Case Is Invidious Discrimination And Other Resulting Unlawful Conduct Committed By Executive Agencies And/Or Officers.

The basis for the Sixth Circuit's affirmation of Defendants' invocation of the state secrets privilege is that, while Defendants and the District Court admit that the core issue of this case involves Defendants' invidious discrimination and resulting unlawful conduct against Tenenbaum, Defendants cannot be tried for their unlawful conduct pursuant to the state secrets privilege because Defendants cannot provide the supposed reason for such unlawful conduct in their defense inasmuch as such reason is somehow a state secret. *See*, *Tenenbaum v. Simonini*, 96 Fed. Appx. 998 (6th Cir. 2004); R. 111, Order, JA at 101-111. Notwithstanding the fact that invidious discrimination is an indefensible reason in and of itself in federal employment (*see*, *infra* § III), the Sixth Circuit's decision "establishes a new rule of law" which blatantly contradicts this Honorable Court's precedent set forth in *United States v. Reynolds*, 345 U.S. 1 (1953).

This Honorable Court first officially recognized the state secrets privilege in *Reynolds* for the protection of military secrets. *See*, *Reynolds*, 345 U.S. at 9-11. In assessing the validity of the Executive Branch's attempt to invoke such a privilege, this Honorable Court held that "[j]udicial control

over the evidence in a case cannot be abdicated to the caprice of executive officers" such that the state secrets privilege may only be invoked if "military secrets" are at stake. *Reynolds*, 345 U.S. at 9-11. In reaching this decision, this Honorable Court emphasized that such a balance is necessary to protect military secrets while avoiding "a complete abandonment of judicial control [which] would lead to intolerable abuses." *Id.* at 8. For instance, in *Reynolds*, the invocation of the state secrets privilege was upheld inasmuch as the core issue in that appeal — requested information involving secret electronic equipment aboard a B-29 bomber that crashed resulting in the deaths of civilian observers on board — directly involved information concerning secret military technology. *See*, *Reynolds*, 345 U.S. at 2-5, 11. As a basis for this landmark recognition of the state secrets privilege, this Honorable Court noted the previous case of *Totten v. United States*, 92 U.S. 105 (1875), where information was held to be privileged inasmuch as such information directly involved covert intelligence operations during the civil war. *Id.* at 11 n.26.

Since *Reynolds*, the Circuit Courts of Appeal have expanded the Executive Branch's ability to invoke the state secrets privilege beyond just military secrets *per se* "to prevent 'impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.'" *Crater Corp. v. Lucent Techs., Inc.*, 255 F.3d 1361, 1370 (Fed. Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 3052 (2002), *quoting Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); R. 111, Order, JA at 101-111. The cases which have expanded the state secrets privilege to encompass these other categories all centered around covert military operations, covert

intelligence operations, the identities of covert military or intelligence operatives, covert military or intelligence techniques and covert diplomatic communication, and these cases all focused on one deciding factor in determining the propriety of the invocation of the state secrets privilege by the Executive Branch — whether the core issue of a case centers around proper state secrets such as the categories listed above, or whether the core issue of a case centers around matters that do not constitute state secrets such as unlawful conduct by Executive agencies and/or officers. *See*, *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998) (the core issue involved military secrets/UFO secrets at "Area 51" Air Force base); *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995) (the core issue involved the identification of covert and undisclosed intelligence operatives and operations); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (the core issue involved missile defense technology); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (the core issue involved missile defense technology); *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814 (9th Cir. 1989) (the core issue involved military technology and plaintiff failed to address state secrets issue); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (the core issue involved a military and intelligence program using dolphins); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) (the core issue involved disclosure of intelligence techniques and foreign relations); *Ellsberg*, 709 F.2d at 51-57 (the core issue implicated the disclosure of surveillance techniques/technology); *Halkin v. Helms ("Halkin II")*, 690 F.2d 977 (D.C. Cir. 1982) (the core issue involved the disclosure of surveillance and intelligence techniques/ technology and undisclosed covert operatives); *Jabara v. Webster*, 691 F.2d 272, 272-279 (6th Cir. 1982) (the core issue involved surveillance techniques and technology); *Halkin v.*

Helms ("Halkin I"), 598 F.2d 1 (D.C. Cir. 1979) (the core issue involved disclosure of surveillance and intelligence techniques/technology and undisclosed covert operatives); *Maxwell v. First Int'l Bank of Maryland*, 143 F.R.D. 590 (D. Md. 1992) (the core issue involved disclosure of undisclosed covert CIA operations).

In contrast, the one case in which the invocation of the state secrets privilege was not upheld was that of *In re United States*, 872 F.2d 472 (D.C. Cir. 1989), on the basis that the core issue of that case involved unlawful conduct by Executive officers which is not a state secret.

In the instant case, the District Court as well as Defendants acknowledged and confirmed that the core issue is unlawful conduct by Executive officers. R. 111, Order at 8, JA at 108. The District Court specifically held that:

> the parties and the court agree that 'the core issue of this case involves Defendants' invidious discrimination against Tenenbaum which culminated in Snyder's interview of Tenenbaum from which Snyder attributed false confessions to Tenenbaum to finally justify an FBI criminal investigation which began with a search and seizure at Plaintiff's residence on the Sabbath, despite the fact that there was no probable cause for this search.' *Id.*

Despite this holding that the core issue of this case is not a state secret, the District Court nevertheless concluded that:

> the allegation of religious discrimination is woven throughout Plaintiff's entire Second Amended

> Complaint. Thus, if the court were to allow any claim to proceed, the court finds that Defendants could not adequately defend against Plaintiff's assertions. *Id.* at 9, Apx. 109.

In affirming the District Court's holding that Defendants' invidious discrimination and other resulting unlawful conduct is somehow a state secret, the Sixth Circuit has "establishe[d] a new rule of law" in violation of *Reynolds* and its progeny inasmuch as the core issue of this case is clearly not a state secret. Rather, the core issue is simply invidious discrimination and the other resulting unlawful conduct.

In addition to the Sixth Circuit's blatant contradiction of *Reynolds* and its progeny, there cannot be any purported "state secrets" providing Defendants with a defense or reason for their unlawful actions inasmuch as the Department of Justice, including the FBI and the U.S. Attorney's Office, have unequivocally admitted that no evidence existed against Tenenbaum, and the lead Assistant U.S. Attorney working with the FBI admitted in a written notification to the FBI that: "There is no question that if evidence existed which would prove this case, then these agents would have found it." R. 96, Br. In Opp'n, Exhs. 95-97, JA at 1346, 1377, 1383-1384[2]. Given these unequivocal and authoritative admissions by the Department of Justice that no evidence existed against Tenenbaum, there cannot be any evidence against Tenenbaum that would somehow justify Defendants' invidious discrimination and resulting unlawful conduct as Defendants contend. *Id.*

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2. These unequivocal admissions were all provided by the FBI and the U.S. Attorney's Office in written documents subject to federal criminal penalties for falsification pursuant to 18 U.S.C. § 1001.

At most, as indicated in the FBI's memorandum to its then-Director, Louis Freeh, Tenenbaum's "uncorroborated confession served as the only lead in this matter" such that this case actually boils down to an issue of credibility between Tenenbaum and Snyder as to what transpired during Snyder's interview of Tenenbaum, not a state secret as Defendants disingenuously suggest. R. 96, Br. In Opp'n, Exh. 97, JA at 1383. Tellingly, the United States Attorneys representing Defendants directly represented to the District Court that this case is entirely premised and solely dependent upon the accuracy of Snyder's representations as to what transpired during his interview of Tenenbaum. R. 86, Nov. 5, 2001 Transcript at 16-18, JA at 394-396.

Thus, inasmuch as the core issue of this case does not involve a state secret and no evidence constituting a state secret could exist in any event pursuant to the Department of Justice's unequivocal and authoritative admissions, the Sixth Circuit's decision "establishes a new rule of law" impermissibly expanding the application of the state secrets privilege well beyond the scope established by this Honorable Court in *Reynolds*. Accordingly, this Honorable Court should grant certiorari and overturn the Sixth Circuit's decision as a matter of law.

II. The Sixth Circuit's Decision Has Created A Split With The United States Court Of Appeals For The D.C. Circuit As To Whether The State Secrets Privilege May Be Invoked Even Where, As Here, It Is Undisputed That The Core Issue Of A Case Is Invidious Discrimination And Other Resulting Unlawful Conduct Committed By Executive Agencies And/Or Officers.

Consistent with *Reynolds*, the United States Court of Appeals for the D.C. Circuit (the "D.C. Circuit") held that the state secrets privilege may not be invoked where the core issue of a case is the unlawful conduct of Executive agencies or officers. *See*, *In re United States*, 872 F.2d at 478. *In re United States* involved a plaintiff suing the FBI under the Federal Tort Claims Act for unlawful acts committed against her and her deceased husband by FBI agents because of her husband's purported involvement with the Communist Party to embarrass and alienate plaintiff and her husband from the Communist Party while discrediting the Communist Party itself. *Id.* at 473-74. In affirming the lower court's refusal to accept the U.S. Attorney General's invocation of the state secrets privilege, the D.C. Circuit quoted the lower court in holding that "plaintiff's claim did not present a case where 'the very subject matter of [the] litigation itself is a state secret'" inasmuch as the core issue of the case was the FBI agents' unlawful conduct. *Id.* at 478. In light of this holding, the D.C. Circuit concluded that the case could proceed with evidentiary control as needed to prevent any real state secrets from being disseminated to the extent that any such secrets were somehow tangentially related to the core issue of the FBI agents' unlawful conduct. *Id.*

In the instant case, the Tenenbaums have similarly brought claims against Executive officers under the Federal Tort Claims Act, as well as under *Bivens*, in which the core issue undisputedly is Defendants' invidious discrimination and other resulting unlawful conduct. *See supra* § I. Therefore, in the D.C. Circuit, Defendants' invocation of the state secrets privilege would not be permitted and the Tenenbaums could proceed with this case subject to any necessary evidentiary control, though the necessity of such control is doubtful given the Department of Justice's unequivocal and authoritative admissions that no evidence exists against Tenenbaum. *Id.*; *In re United States*, 872 F.2d at 478. The Sixth Circuit, however, has taken the diametrically opposed position by affirming Defendants' invocation of the state secrets privilege in this case where the core issue undisputedly is Defendants' invidious discrimination and other resulting unlawful conduct. *See infra* § III.

By virtue of the Sixth Circuit's decision, there is now a substantive split between the Sixth Circuit and the D.C. Circuit that should be resolved by this Honorable Court for the sake of fairness and uniformity in all federal circuits in assessing the scope and applicability of the state secrets privilege.

III. The Sixth Circuit's Decision Has Transformed The State Secrets Privilege Into An Unlimited, Uncheckable And Absolutist Executive Branch Power In Violation Of The Constitutional Doctrine Of Separation Of Powers, Legislative Statutes And Executive Regulations And Orders.

The Sixth Circuit's decision is the first time that a federal appellate court has permitted the invocation of the state secrets privilege, not as a shield to protect real state secrets, but as a sword for Executive agencies and officers to escape liability where the core issue of the claim(s) against them is solely invidious discrimination and/or other unlawful conduct. In holding that the state secrets privilege encompasses invidious discrimination and other unlawful acts of Executive agencies and officers, the Sixth Circuit has removed any and all limitation to the scope and applicability of the state secrets privilege. *See supra* § I. Consequently, Executive agencies and officers responsible for committing unlawful acts merely need to comply with the formalities of invoking the state secrets privilege in any ensuing litigation after which time the invocation of the state secrets privilege will serve to relieve them of liability for their unlawful acts even though such acts are obviously the core issue of the litigation.

This "new rule of law" established by the Sixth Circuit is exactly the type of situation which this Honorable Court attempted to prevent in *Reynolds* in holding that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" inasmuch as "a complete abandonment of judicial control would lead to intolerable

abuses." *Reynolds*, 345 U.S. at 8-11. Indeed, the Sixth Circuit's decision effectively establishes in the Executive Branch an unlimited, uncheckable and absolutist power to commit any and all unlawful acts while avoiding liability under the pretense of state secrets which affronts all tenets of liberty protected by the doctrine of separation of powers along with the power of judicial review. Furthermore, such unbridled Executive Branch power affronts the statutes and regulations established by the Legislative and Executive Branches which expressly forbid unlawful conduct by their agencies and officers such as the invidious discrimination and other resulting unlawful conduct perpetrated by Defendants in this case.

One of the leading legal principles championed by this Honorable Court is that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In affording such protection, "the central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Misretta v. United States*, 488 U.S. 361, 380 (1989), *citing*, *Morrison v. Olson*, 487 U.S. 654, 685-96 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986).

Separation of powers is so central to our national foundation that, from its inception, this Honorable Court has held that the government "is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either." *Hayburn's*

Case, 2 U.S. 409, 410 (1792). "Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996) (citations omitted). As James Madison wrote in supporting the ratification of the Constitution:

> [i]t is agreed on all sides, that the powers belonging to one of the [branches] ought not to be directly and completely administered by either of the other [branches]. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. THE FEDERALIST NO. 48 (James Madison).

In line with these universal truths as to the encroaching nature of power, Madison cautioned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison). *See also*, *Misretta v. United States*, 488 U.S. 361, 381 (1989) (tyranny is "the accumulation of excessive authority in a single Branch"). Madison further wrote that "the greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others," and such principles have been reconfirmed by this Honorable Court. THE FEDERALIST NO. 51 (James Madison); *Misretta*, 488 U.S. 381-82.

So strong is this principle of separation of powers in preserving liberty against unchecked Executive Branch power that this Honorable Court recently held that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, No. 03-6696, 2004 U.S. LEXIS 4761, at *51 (U.S. June 28, 2004), *citing*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.*, *citing*, *Misretta*, 488 U.S. at 380.

Despite this Honorable Court's preservation of liberty against unchecked Executive Branch power even in a time of war and in favor of an enemy combatant, the "new rule of law" established by the Sixth Circuit undermines all separation of powers precedent. Application of the state secrets privilege in cases where the core issue relates to the wrongful conduct of executive officers actionable under the Federal Tort Claims Act or pursuant to *Bivens*, regardless of requiring the Executive Branch to go through the superficial and self-serving motions of submitting affidavits and information under seal to invoke the state secrets privilege, effectively negates separation of powers in practice thereby creating in the state secrets privilege an absolutist Executive Branch power which Supreme Court precedent expressly forbids, and which the Framers of the Constitution expressly feared and designed the Constitution to forbid. As noted by Alexander Hamilton:

> 'there is no liberty, if the power of judging be not separated from the legislative and executive

> powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other [branches]. THE FEDERALIST NO. 78 (Alexander Hamilton), *quoting* MONTESQUIEU, SPIRIT OF LAWS 181.

Madison further noted that:

> '[w]ere [the power of judging] joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.' THE FEDERALIST NO. 47 (James Madison), *quoting*, Montesquieu without citation.

In the spirit of preserving the necessary separation of powers, this Honorable Court has persistently exercised the power of judicial review throughout its illustrious history to scrutinize alleged unlawful activities or encroachments of power involving the Executive Branch, the Legislative Branch as well as the executive and legislative branches of the United States in cases where the core issue is central to the functions of such branches and civil liberties are at stake. In the last half-century alone, this Honorable Court has announced numerous landmark decisions in this respect. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 699-710 (1997) (the doctrine of separation of powers does not immunize the President from suit for unlawful acts committed prior to taking office, nor does it require a stay in such suits until after the President leaves office); *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government

interest" in enacting legislation), *quoting*, *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (Wisconsin's punishment enhancement statute was constitutionally enacted on the basis that unlawful conduct motivated by invidious discrimination inflicts greater harm to society); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (executive decisions regarding security clearances are justiciable where constitutional claims are involved "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[c]onstitutional questions obviously are unsuited to resolution in administrative procedures and, therefore, access to the courts is essential to the decision of such questions"); *United States v. Nixon*, 418 U.S. 683 (1974) (there is no absolute Executive privilege of confidentiality for Presidential communications); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) (discriminatory state action exists where a state grants licences to invidiously discriminatory private clubs); *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957) (the informant's privilege is not an absolute Executive privilege and must give way where the identity of an informant has been disclosed or where, based upon the fundamental requirements of fairness, the identity of an informant or the content of the information provided by the informant is essential to a fair determination in a case); *Konigsberg v. State Bar of California*, 353 U.S. 252, 267-68 (1957) (mere membership in a politically unpopular group, even one where members are involved in illegal or disloyal activities, is insufficient for adverse state action); *Reid v. Covert*, 354 U.S. 1, 12-40 (1957) (to effectuate principles of justice and the necessary separation of powers, military courts overseas have no jurisdiction over U.S. civilians); *Bolling v.*

Sharpe, 347 U.S. 497, 498 (1954) (states are prohibited from maintaining racially segregated schools); *Weiman v. Updergraff*, 344 U.S. 183 (1952) (preclusion from public service on disloyalty grounds is not allowed based upon indiscriminate and arbitrary classification in holding an innocent person disloyal for mere association or membership in a politically unpopular or subversive group); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 138-42 (1951) (administrative agencies have no absolute power to make determinations that are arbitrary or contrary to fact); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (the establishment of religion clause of the First Amendment means that the federal government cannot pass laws which prefer one religion over another). *See also*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683, 710 (6th Cir. 2002) (the executive branch may not conduct secret deportation hearings over non-citizens deemed to be enemies associated with terrorism because "[d]emocracies die behind closed doors" and "[a] government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution"); *Bergman v. United States*, 565 F. Supp. 1353, 1363-67 (W.D. Mich. 1983) (the FBI may not invoke the informant's privilege to escape civil liability because: (1) the obligations of the FBI cannot transcend the interests of the lawsuit where such obligations denigrated the interests of justice under the Nation's laws; and (2) the FBI cannot effectively sit in judgment on its privilege assertion as this is contrary to the cornerstone of our constitutional government which is the separation of government powers).

The Sixth Circuit's "new rule of law" is utterly inconsistent with such precedent and turns the fundamental principles of separation of powers and judicial review on

their heads. Furthermore, the Sixth Circuit's "new rule of law" blatantly contradicts the applicable Legislative statutes and Executive regulations and orders which expressly forbid the invidious discrimination and other resulting unlawful conduct perpetrated by Defendants in this case.

From the standpoint of the Legislative Branch, "[i]t is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin." 5 U.S.C. § 7201(b) (App. E). Thus, discrimination based on religion is completely prohibited in federal employment. *See*, 42 U.S.C. § 2000e-16 (App. F). Section 2000e-2 of the Civil Rights Act of 1964 further provides that:

> [e]xcept as otherwise provided in this title [42 U.S.C. §§ 2000e, *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (App. G)[3]. *See also*, THE FEDERALIST No. 50 (Alexander Hamilton or James Madison) ("[i]n a free government the security for civil rights must be the same as that for religious rights").

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3. In regards to the "[e]xcept as otherwise provided" language, nowhere in the Civil Rights Act of 1964 does the Act allow for a federal employee to be discriminated against in violation of his/her constitutional, statutory and regulatory rights, or for the purpose of adversely affecting the employee's career, based on religious discrimination. *See*, 42 U.S.C. § 2000e, *et seq.*

Consistent with Legislative mandates, the Executive Branch has enacted regulations unequivocally prohibiting DoD employees from discriminating or being discriminated against on the basis of religion. *See, e.g.*, 5 C.F.R. § 2635.101(13) (App. H); 5 C.F.R. § 3601.101 (App. I); 32 C.F.R. § 40.2 (App. J); AR 60-21 at § 1-17 (App. L). *See also*, R. 96, Br. In Opp'n, Exh. 64, JA at 1121, 1123. Furthermore, Executive orders not only prohibit the unlawful conduct perpetrated by Defendants, but they also prohibit the concealment and secretion of such unlawful conduct as Defendants' have done by invoking the state secrets privilege. Executive Order 12333 expressly prohibits intelligence-related investigative activities which are inconsistent with the Constitution, applicable laws and principles upon which the United States was founded. Executive Order 12333 at §§ 2.1, 2.2, 2.4, 2.8 (App. O). Executive Order 12958 further provides that "[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; . . . or (4) prevent or delay the release of information that does not require protection in the interest of national security." Executive Order 12958 at § 1.8(a), (App. P). Under these mutually exclusive categories, Defendants, by the unequivocal and authoritative decree of the President on behalf of the Executive Branch, are absolutely prohibited from invoking the state secrets privilege to conceal their invidious discrimination and other resulting unlawful conduct. *See*, *supra* § I.

In addition, DoD regulations expressly forbid DoD officers and agents from conducting criminal counter-intelligence investigations into civilian employees such as Tenenbaum. DoD 5200.2-R, §§ 2-401(b)-(c) (App. K) AR 380-67, §§ 2-401(b)-(c) (App. M); AR 381-20, § 4-5(d) (App. N); Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the FBI, §§ 5-6 (Final Br. of Appellants, Vol. II, A46-A50); Supplement to 1979 FBI/DoD Memorandum of Understanding: Coordination of Counterintelligence Matters Between FBI & DoD (Final Br. of Appellants, Vol. II, at A51-A54).

Inasmuch as the Legislative statutes and Executive regulations and orders unequivocally and authoritatively prohibit the unlawful conduct perpetrated by Defendants against Petitioners both in the events leading up to this case and then invoking the state secrets privilege to prevent such unlawful conduct from coming to light, it is further apparent that the Sixth Circuit's decision "establish[ing] a new rule of law" should be overturned as a matter of law.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Petitioners, David Aaron Tenenbaum and Madeline Gail Tenenbaum, respectfully request that this Honorable Court grant the instant Petition for Writ of Certiorari, or in the alternative, reverse the decisions of the United States District Court for the Eastern District of Michigan, Southern Division, and the United States Court of Appeals for the Sixth Circuit, and remand this case for further proceedings and trial.

Respectfully submitted,

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